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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-889

DAVID M. BELL,

Petitioner,

versus

TAYLOR'S WELDING SERVICE, INC., ET AL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF LOUISIANA

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TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

FEDERAL STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

STAGE IN PROCEEDINGS AND MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED 8

SPECIAL AND IMPORTANT REASONS FOR GRANTING THIS WRIT OF CERTIORARI 10

CONCLUSION 19

CERTIFICATE 21

APPENDIX "A" 1a

APPENDIX "B" 2a

APPENDIX "C" 14a

TABLE OF AUTHORITIES

Cases:

Cleveland-Cliff's Iron Co. v. Martini, 96 F.2d 632, 633-634, cert. den. 59 S.Ct. 65, 305 U.S. 605, 83 L.Ed. 384 (6th Cir., 1938) 19

Epling v. M. T. Epling Co., 435 F.2d 732, 736 (6th Cir. 1970) 19

Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 12,13,15

TABLE OF AUTHORITIES (Continued)

Page

Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 10,11,12,13,15,20

Trahan v. Gulf Crews, Inc., La. 255 So.2d 63 (1971) 12

Wychgel v. States S.S. Co., 296 Pac. 863, 135 OR 475, cert. den. 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533 18

Statutes:

28 U.S.C. 1257(3) 2

Federal Employer's Liability Act, 45 U.S.C. 51-60 4

Jones Act, 46 U.S.C. 688 2,3,20

IN THE
SUPREME COURT OF THE UNITED STATES
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DAVID M. BELL,

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versus

TAYLOR'S WELDING SERVICE, INC., ET AL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF LOUISIANA

The petitioner, David M. Bell, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana, denying petitioner's application for writs thereto; that writ was applied for to review the judgment and opinion of the Third Circuit Court of Appeal of the State of Louisiana, which judgment reversed a jury verdict under the Jones Act rendered in the Fourteenth Judicial District Court, Parish of Cameron, Louisiana, in plaintiff's favor; the said writ was denied by the Louisiana Supreme Court on October 24, 1974.

I.

OPINIONS BELOW

The judgment of the Louisiana Supreme Court denying petitioner's application for writs is reported at 302 So.2d 27, and is reproduced in Appendix "A" to this petition. The opinion of the Louisiana Third Circuit Court of Appeal in which petitioner's jury verdict was reversed and rendered is reported at 298 So.2d 327, and is reproduced in Appendix "B" to this petition.

II.

JURISDICTION

(1) The final judgment of the Louisiana Supreme Court denying petitioner's timely application for writs thereto was entered October 24, 1974.

(2) The jurisdiction of this court is invoked under the provisions of 28 USC 1257(3). The action of the Louisiana Supreme Court and the Louisiana Third Circuit Court of Appeal in reversing petitioner's jury award has trampled upon petitioner's federally protected rights and privileges under the Jones Act, 46 USC 688.

III.

QUESTIONS PRESENTED FOR REVIEW

(1) Should a State Court of Appeal be allowed to exercise the same *broad powers* of appellate review of both law *and fact* and to apply the same standard of

negligence in a Jones Act case, 46 USC 688, as it is allowed to exercise and apply under the State Constitution in *ordinary* civil cases?

(2) Should a Jones Act employer be allowed to avoid its duty to provide its employees with a safe place to work and thus avoid liability to its employee by *delegating* away the duty to provide safe work premises?

IV.

FEDERAL STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of the Jones Act, 46 USC 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the dis-

trict in which the defendant employer resides or in which his principal office is located."

Also attached hereto as Appendix "C" is the Federal Employer's Liability Act, 45 USC 51-60, upon which most of the substantive provisions of the Jones Act are based.

V.

STATEMENT OF THE CASE

Plaintiff-applicant, David M. Bell, filed this suit under the Jones Act and general maritime law for damages for personal injuries received by him arising out of an accident which occurred aboard the M/V STATE RACE. The accident occurred during the performance of repair work by defendant, Taylor's Welding Service, Inc. (Taylor), on Mobil Oil Corporation's (Mobil) offshore production platform in Block 110, West Cameron Area. Made defendants were Taylor's Welding Service, Inc., plaintiff's employer at the time of the accident, and its insurer, and National Boat Corporation, the owner of the vessel on which Bell was working at the time he sustained the injury, and its insurer.

Prior to trial, plaintiff compromised his claim against National Boat Corporation and its insurer; Taylor's Welding Service, Inc. subsequently asserted a third-party demand against National Boat Corporation and its insurer.

Taylor's Welding Service, Inc., principally owned by Larry Taylor, was engaged in the business of supplying welding services for offshore well platforms. Taylor con-

tracted to do certain welding repair work on a production platform of Mobil Oil Corporation about forty miles offshore of Cameron Parish, Louisiana. Under the agreement, Taylor furnished the necessary labor, equipment and supplies to perform the welding, and the vessel STATE RACE was made available to Taylor's crew for living quarters and as a base for the repair work, most of which was near and below water level on the platform.

Taylor's welding crew and all of their equipment and materials were loaded onto the STATE RACE in Cameron, Louisiana, at the Mobil docks, and the vessel proceeded to the platform where it was moored for its work.

At the time of the accident, the vessel was moored with a hawser from the starboard stern bit, located six to eight feet forward of the stern. The hawser ran aft twenty-five or thirty feet from the bit to the place where it was tied to the platform. The stern of the vessel was placed toward the direction from which the waves were coming. Some of the welding equipment and supplies were unloaded from the vessel onto the platform, and the work had begun and was in progress when the accident occurred. Plaintiff was on the stern of the vessel directing the work of the welders on the platform. For about forty-five minutes before the accident, plaintiff had been standing about one foot from the stern and one foot from the starboard rail. While standing in that position, the stern of the vessel dropped, and the hawser (which was improperly and insufficiently secured) came over the starboard rail, striking plaintiff on the leg and causing a fracture.

The case was tried to a jury, which returned special verdicts in the form of written interrogatories finding: (1) that David Bell was a seaman under the Jones Act; (2) that Taylor's Welding Service, Inc., Bell's employer, was guilty of negligence which was a proximate cause of the accident; (3) that David Bell was not guilty of any contributory negligence which was a proximate cause of the accident; and (4) awarding damages to the plaintiff in the amount of $36,000.00. The jury further found that the vessel STATE RACE was not unseaworthy and that the National Boat Corporation was not guilty of any negligence which was a proximate cause of the accident. The district court entered judgment on the jury verdict in favor of plaintiff in the amount of $36,000.00. It rejected Taylor's third-party demand against National Boat Corporation because of the jury's finding that the vessel was seaworthy and that there had been no negligence on the part of National Boat Corporation.

Taylor and its insurer appealed the judgment against them in favor of plaintiff. They also appealed from the judgment rejecting their third-party demand against National Boat Corporation. On July 29, 1974, the Louisiana Third Circuit Court of Appeal reversed petitioner's jury verdict and rendered judgment rejecting Bell's suit, all at his costs.

Bell's counsel received notice of the above opinion on July 29, 1974 and timely filed an application for rehearing, which was denied by the Louisiana Court of Appeal, Third Circuit, on August 21, 1974.

The decisive issues to be determined in the case were properly outlined by the Louisiana Court of Appeal in its

opinion at page 2 (Appendix "B", page 3a), wherein the court stated these issues to be as follows:

(1) Was the plaintiff a seaman?

(2) Was Taylor's Welding Service, Inc. an employer under the Jones Act?

(3) Was Taylor's Welding Service, Inc. guilty of any negligence which was a cause of the accident?

The court then analyzed each of these issues and, in answer to the first two questions properly determined affirmatively that the plaintiff, David M. Bell, was a seaman within the contemplation of the Jones Act, and that his employer, Taylor's Welding Service, Inc., was an employer under the Jones Act. However, when it reached the third issue, i.e. *negligence* of the employer, the court reversed the jury's finding of negligence, thereby denying Bell's claim and, in doing so, committed grave errors of law. The court erred first in defining the scope of its appellate review and the standard of care owed by employers under the Jones Act; secondly, and more importantly, in applying that standard of appellate review and that duty of care to the facts of this case; and lastly, in allowing the Jones Act employer to avoid liability by delegating away that duty to its employees. The court, differing with the jury's interpretation of the evidence, substituted its own judgment for that of the jury and reversed the judgment of the lower court, rejecting plaintiff's demands at his costs.

The Louisiana Supreme Court declined to grant the plaintiff a hearing and denied petitioner's writ application on October 24, 1974. The Louisiana Supreme Court made no independent observations and gave no written reasons for denying Bell's writ, merely stating that the Court of Appeal was correct. Thus it is the Louisiana Third Circuit Court of Appeal's written opinion that must be analyzed herein.

VI.

STAGE IN PROCEEDINGS AND MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

This suit from its inception has been based upon the provisions of the Jones Act which provides protection for seamen suffering personal injury during the course and scope of their employment and which provides a right of action for damages against the seaman's employer. The federal questions sought to be reviewed herein arose upon the rendition of judgment and written reasons therefor by the Louisiana Third Circuit Court of Appeal reversing a jury verdict that had been rendered in favor of petitioner, David M. Bell, in the amount of $36,000.00.

The questions presented for review were first raised in petitioner's Application for Writs to the Louisiana Supreme Court to review the Third Circuit's judgment by Assignment of Errors contained in that application. The Louisiana Supreme Court denied petitioner a hearing on those assignments of error, merely stating that "The judgment of the Court of Appeal is correct."

The Assignments of Error, as originally stated in petitioner's Application for Writs to the Louisiana Supreme Court, are quoted as follows:

"*ASSIGNMENT OF ERRORS*

THE COURT OF APPEAL ERRED:

(1) IN INSUFFICIENTLY AND IMPROPERLY DEFINING THE SCOPE OF APPELLATE REVIEW OF JURY FINDINGS AND THE STANDARD OF NEGLIGENCE REQUIRED TO HOLD AN EMPLOYER LIABLE TO ITS EMPLOYEE UNDER THE JONES ACT.

(2) IN IMPROPERLY APPLYING THE STRICT AND VERY LIMITED SCOPE OF APPELLATE REVIEW OF JURY FINDINGS UNDER THE JONES ACT TO THE FACTS OF THE PRESENT CASE, AND IN IMPROPERLY APPLYING THE JONES ACT STANDARD OF NEGLIGENCE REQUIRED TO HOLD THE EMPLOYER LIABLE TO ITS INJURED EMPLOYEE.

(3) IN HOLDING THAT A JONES ACT EMPLOYER, SUCH AS TAYLOR'S WELDING SERVICE, INC., MAY AVOID ITS DUTY TO PROVIDE ITS EMPLOYEES WITH A SAFE PLACE TO WORK AND THUS AVOID LIABILITY TO ITS EMPLOYEE, DAVID M. BELL, BY DELEGATING AWAY THE DUTY TO PROVIDE SAFE WORK PREMISES."

VII.

SPECIAL AND IMPORTANT REASONS FOR GRANTING THIS WRIT OF CERTIORARI

> "Special and important reasons for the grant of certiorari in these cases are certainly present when both federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 451, 1 L.Ed.2d 493.

A Jones Act seaman is injured aboard a vessel during the course and scope of his employment when the hawser, by which the vessel is improperly moored, jumps over the railing of the vessel and strikes the seaman's leg. The plaintiff's Jones Act employer admits never even having seen the vessel prior to the time it departed for the job site, much less inspected it to insure that the vessel constituted a safe place to work. The trial jury, finding negligence on the part of the employer, awards a substantial verdict to the plaintiff. The Louisiana Third Circuit Court of Appeal disagrees with the jury's finding of employer negligence and therefore substitutes its own judgment for that of the trier of fact, reversing the jury's finding of employer negligence, and denying the plaintiff's claim for Jones Act relief.

Should appellate courts be allowed to exercise such excessively broad powers of appellate review of jury findings in a Jones Act claim, thereby imposing a narrow and niggardly construction of the employee's rights under the Jones Act — especially when the record uncontrovertibly shows that the employer made no effort whatsoever to in-

sure safety of the employee's work premises, or at the very least to warn the employee of the dangerous condition on the premises that ultimately resulted in his injury?

The Louisiana Supreme Court and the Louisiana Third Circuit Court of Appeal answered "yes" to this question and effectively exercised in this Jones Act case the same standard of appellate review as it is allowed to exercise in ordinary civil cases. This amounts to a serious and substantially prejudicial deprivation to this Jones Act employee of the rights intended for him by the Congressional enactment.

The Louisiana Third Circuit Court of Appeal, affirmed by the Louisiana Supreme Court, has upset a substantial jury verdict awarded to a Jones Act employee seriously injured during the course and scope of his employment solely on the basis that the appellate court interpreted the evidence of employer negligence differently from the way the jury interpreted it. Under the above circumstances, just as in *Rogers* v. *Mo. Pac. R.R. Co.*, supra, special and important reasons for the grant of certiorari are present when a lower state court has deprived a Jones Act employee of his right to a jury determination.

At page 4 of its opinion, the Louisiana Court of Appeal made the following observation as to the state court's scope of appellate review in Jones Act claims:

> ". . . a Louisiana appellate court's review of a jury verdict in a suit under the Jones Act, is the same as that of the Federal Courts. Under Federal law and jurisprudence, *an appellate court cannot disturb the finding of fact of a trial*

> *jury on the merits unless there is no reasonable evidentiary basis for the jury's conclusion.*" Citing *Trahan* v. *Gulf Crews, Inc.*, La. 255 So.2d 63 (1971). [Emphasis ours] (App. p. 5a)

Though this observation by the lower court is indeed correct, it does not go nearly far enough in defining the very narrow and limited scope of appellate review in Jones Act cases and fails to recognize the full import of the *Trahan* decision, supra, but *even more significantly*, it fails to recognize the full import of the *foundation* of *Trahan* in the U.S. Supreme Court decisions of *Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, and *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916. As recognized and reiterated by the Louisiana court in *Trahan*, supra, the *Rogers* decision held that in Jones Act cases the judicial right of review of facts is restricted to the *single inquiry* of whether, within reason, the evidence adduced supports the conclusion that the negligence of the employer played *any part at all* in the injury or death of the employee. [77 S.Ct. 448] The Louisiana court went on in *Trahan* to emphasize the Supreme Court's reasoning in *Rogers*, stating:

> "The court stressed the special and important reasons for granting certiorari in such cases 'when *lower* federal and *state courts persistently deprive litigants of their right to a jury determination*' by substituting their own view of the facts for the jury's findings and, in this manner, erode Congressional intent in the enactment of such acts 'by narrow and niggardly construction.' " [Emphasis ours]

Similarly pertinent to the present case is the following quotation from the U. S. Supreme Court's decision in *Lavender* v. *Kurn*, supra:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. * * * Only when there is a *complete absence of probative facts* to support the conclusion reached does a reversible error appear. But where * * * there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." [Emphasis ours]

Further elaboration on the burden of proof and standard of negligence required to be proven for recovery under the Jones Act is found in *Rogers*, supra, at 77 S.Ct. 448. The court states that:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the

single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

"* * * for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

"Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination."

"* * * In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the Congressional scheme. We reach the same conclusion in this case. The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions *exclusively* in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special

> and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." [Emphasis ours]

What the court seemed to be saying in *Rogers* and in *Lavender* was that in Jones Act claims, such as this claim of David M. Bell, **the jury's findings are not to be taken lightly and should not be disregarded by State Courts of Appeal.** The Court of Appeal's judgment should be substituted for the findings of a jury *only in the most extreme circumstances.* Though the Louisiana Court of Appeal in David Bell's case gave lip service to those principles set forth in *Rogers* and *Lavender*, it in effect applied the same standard of appellate review of fact to the plaintiff's case that is exercisable in all ordinary state cases, i.e. the Court of Appeal reviewed the jury's finding of employer negligence exercising the broad scope of appellate review of *law and fact* that it is empowered to exercise by the *Louisiana Constitution* in *all* other civil cases.

The testimony taken at the trial of this matter is replete with evidence that Taylor's Welding Service, Inc., plaintiff's employer, made *no effort whatsoever* to inspect the premises on which plaintiff was working in order to insure that its employees (including plaintiff) were given a safe place to work. The jurisprudence is so well-established as to require no citation of authorities that a Jones Act employer has an affirmative duty to provide his employees with a safe place in which to work.

The record conclusively establishes that Taylor *never even saw* the M/V STATE RACE, much less made any

attempts to insure its safety as a working place for its employees (see Tr. pp. 32, 43, 187), despite the fact that he could easily have done so and could have easily given safety instructions to insure the proper mooring of the vessel (Tr. p. 202). Alternatively, if there was no way that the mooring of the vessel could be accomplished safely, at the very least the employer had an affirmative duty to warn its employees that the premises could not be made safer and thus warn them of the hazardous condition aboard the STATE RACE.

In view of Taylor's complete and absolute disregard for whether or not its employees had a safe and adequate place to work, it is difficult to see on what basis the Court of Appeal relied in reversing the jury's finding of negligence on the part of Taylor's Welding Service, Inc.

Apparently the appellate court determined to relieve Taylor of liability for its negligence on the basis of the employer having delegated the duty to plaintiff to provide for his own safety and for the safety of the welding crew. But, if such a delegation of the employer's duty were allowable and if such a theory were allowed to defeat plaintiff's recovery herein, which we respectfully submit that it is not as will be discussed more fully in this application, then the employer would in effect be telling his employees to look out for their own safety and that he was thereby relieving himself of responsibility for their safety. To allow such a theory to defeat plaintiff's recovery would be in effect allowing the Jones Act employer to *force* his employees to assume *any* risks of unsafe premises, no matter how unsafe and no matter how grossly negligent the employer had been in failing to remedy the situation.

The Louisiana Court of Appeal is saying that the employer was not negligent because it didn't inspect the working premises and therefore wasn't *aware* of the hazardous conditions, i.e. the improper mooring of the vessel, at the time of the accident. The fact that Taylor himself wasn't aboard the vessel and that he hadn't taken the time to inspect the vessel or to see that instructions for proper mooring were given should not relieve the employer of its liability for plaintiff's injuries. Indeed that failure to inspect and the clear breach of that non-delegable duty to provide a safe place to work is more than ample evidence to support the jury's finding that Taylor's Welding Service, Inc. was negligent. Again, as discussed previously herein, the jury's finding of evidence of *any negligence, no matter how slight,* which played *any part whatsoever* in the employee's injury is sufficient to hold the employer liable for these injuries. The testimony as outlined above more than adequately demonstrates that the jury was indeed justified in finding Taylor's Welding Service, Inc. negligent.

The Louisiana Court of Appeal at page 10 of its opinion, after having concluded improperly that there was no evidentiary basis for the jury's conclusion that Taylor was negligent, went further to substantiate and fortify its reversal by holding that Taylor *delegated* to the plaintiff the duty to provide himself and his crew with a safe place to work. (App. p. 13a) This reasoning goes directly against the grain and violates the entire theory of the Jones Act to provide recovery against employers when the employee is injured through his employer's negligence. The court in effect has allowed the employer to avoid Jones Act liability by placing the duty to provide a safe place to work *on the employees themselves.*

It has long been established in the jurisprudence that the duty to provide a Jones Act employee with a safe place to work is *non-delegable* and is *continuing*. In the early case of *Wychgel* v. *States S.S. Co.*, 296 Pac. 863, 135 OR 475, cert. den. 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533, the court made the following statements at 296 p. 867-868:

> "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe."
>
> "He has a right to look to the master for the discharge of that duty and, if the master sees fit to have it attended to by others, that does not change the measure of his obligation to the employee or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects."
>
> "*The employer is found to provide a reasonably safe place in which the employee is to work. This is a positive duty resting upon him. It is one which he may not avoid by turning it over to some employee.* There is no guaranty by the employer that the place shall be absolutely safe. He is bound to take reasonable care and make a reasonable effort, and the greater the risk which attends the work to be done the more imperative is the obligation resting upon him. Patton v. Texas & Pac. Ry. Co., 179 U.S. 658, 21 S.Ct. 275, 45 L.Ed. 361; Baltimore & Potomac R. Co. v. Mackey, 147 U.S. 72, 87, 15 S.Ct. 491, 39 L.Ed.

624; Texas & Pac. Ry. Co. v. Archibald, 170 U.S. 665, 669, 18 S.Ct. 777, 42 L.Ed. 1188; The Thomas Cranage (D.C.) 189 F 1003." (Emphasis ours)

The same rules have been espoused in *Cleveland-Cliff's Iron Co.* v. *Martini*, 96 F.2d 632, 633-634, cert. den. 59 S.Ct. 65, 305 U.S. 605, 83 L.Ed. 384 (6th Cir., 1938), and in *Epling* v. *M. T. Epling Co.*, 435 F.2d 732, 736 (6th Cir. 1970).

In David M. Bell's case, these same principles apply and similarly the same reason for disallowing the employer's delegation of his duty to provide a safe place to work is applicable. The employer's positive duty must be fulfilled *by the employer* and that duty may not be shifted, delegated or escaped by the employer under any circumstance. We again emphasize the calamitous result that would be inevitable should such a delegation of the duty be allowed. Jones Act employers would quickly learn that all they need do to avoid liability to their employees would be to tell those employees to look out for their own safety and to provide for themselves a safe place to work. This most unfortunate situation must not be allowed to develop, and can only be avoided by this court granting a writ of certiorari and overruling the Louisiana Supreme Court's and Third Circuit Court of Appeal's action in allowing such a delegation of the employer's duty.

VIII.

CONCLUSION

The Louisiana Supreme Court and Third Circuit Court of Appeal have in this case severely strained and improperly limited the rights of plaintiff-applicant, David M.

Bell under the Jones Act, 46 USC 688, and indeed have eroded the Congressional intent behind the Act by its narrow and niggardly construction thereof. The court has in effect applied to this Jones Act case, not the very limited scope of appellate review as in federal courts, but rather the very broad scope of appellate review of both law and fact which the state courts of appeal are empowered to exercise under the Louisiana Constitution. The federally protected rights of the seaman, David M. Bell, under the Jones Act have been virtually trampled upon.

The lower court's view that there is no reasonable evidentiary basis for the jury's finding of negligence by Taylor's Welding Service, Inc. is unfounded, and has no basis in the record. The lower court's action in disregarding the jury's verdict and substituting its own judgment is manifestly erroneous and contrary to the law and evidence and, more importantly, to the intent of the enactors of the Jones Act.

The state court seems to run rampant in disregarding the jurisprudence, both federal and state, in deciding this case. It substitutes its own facts and its own law to determine the outcome by allowing the defendant Jones Act employer to delegate and shift and therefore avoid its duty to provide a safe place for its employees to work.

We therefore respectfully submit that in this case, just as in *Rogers* v. *Mo. Pac. R.R. Co.*, supra, special and important reasons for the grant of certiorari are certainly present herein where the Louisiana Supreme Court and the Louisiana Third Circuit Court of Appeal have attempted by a narrow and niggardly construction of the Jones Act to deprive David M. Bell of his federally

protected right to a jury determination under the Jones Act standard of employer negligence.

Respectfully submitted,

Robert M. McHale
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Post Office Drawer M
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_____

Glenn W. Alexander

_____

Robert M. McHale

CERTIFICATE

I hereby certify that three copies of the foregoing petition for writ of certiorari to the United States Supreme Court have this day been mailed, postage prepaid, to opposing counsel as follows:

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Cameron, Louisiana, this ____ day of January, 1975.

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APPENDIX "A"

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

DAVID M. BELL, THE NORTH WEST INSURANCE CO.

versus No. 55,333

TAYLOR's WELDING SERVICE, INC., ET AL

October 24, 1974

In re: David M. Bell applying for certiorari, or writ of review, to the Court of Appeal, Third Circuit, Parish of Cameron

Writ denied. The judgment of the Court of Appeal is correct.

/s/ WFM
/s/ JWS
/s/ FWS
/s/ JAD
/s/ PFC

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
October 24, 1974

/s/ Phil Trice
Deputy Clerk

APPENDIX "B"

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

DAVID M. BELL
Plaintiff & Appellee

versus No. 4589

NATIONAL BOAT CORPORATION, ET AL.
Defendants & Appellants

Appeal from the Fourteenth Judicial District Court for the Parish of Cameron, Judge Cecil C. Cutrer presiding

Before Hood, Culpepper and Miller, Judges

Culpepper, Judge

The plaintiff, David M. Bell, filed this suit for damages for personal injuries under the Jones Act and general maritime law. He named as defendants National Boat Corporation, the owner of the vessel on which he was working at the time he sustained the injury, and Taylor's Welding Service, Inc., his employer at the time of the accident. Prior to trial, plaintiff compromised his claim against National Boat Corporation and its insurer for the sum of $26,290, plus an additional sum up to $3,710 to be paid in the event Bell failed to recover the total of these sums from Taylor.

In the trial in the district court, a jury returned a verdict in favor of plaintiff and against defendant, Taylor's Welding Service, Inc., for the sum of $36,000. Taylor's third party demand against National Boat Corporation was rejected because the jury found the vessel seaworthy and found no negligence by National Boat Corporation or its captain. The district court entered judgment on the jury verdict, denying Taylor and its insurer any credit for the amount received by plaintiff in his settlement with National Boat Corporation. The district judge also rejected the claim of Taylor's insurer for reimbursement of $3,710 paid to plaintiff in workmen's compensation benefits, but recognized Taylor's insurer's claim for the sum of $3,058.72 paid to plaintiff for medical expenses and cure.

Taylor and its insurer appealed the judgment against them in favor of plaintiff. They also appealed from the judgment rejecting their third party demand against National Boat Corporation. The intervenor, North-West, appealed from the judgment rejecting its claim for reimbursement for workmen's compensation payments.

The decisive issues are: (1) Was the plaintiff a seaman? (2) Was Taylor's Welding Service, Inc. an employer under the Jones Act? (3) Was Taylor's Welding Service, Inc. guilty of any negligence which was a cause of the accident?

Taylor's Welding Service, Inc., principally owned by Larry Taylor, was engaged in the business of supplying welding services for offshore well platforms. Taylor contracted to do certain welding repair work on a production platform of Mobil Oil Corporation, about 40 miles off the shore of Cameron Parish, Louisiana. Under the agree-

ment, Taylor furnished the necessary labor, equipment and supplies to perform the welding. Mobil Oil supplied the vessel to transport Taylor's crew to the platform, the vessel to be available to Taylor's crew for living quarters and as a base for the repair work, some of which was near and below water level on the platform.

Taylor designated plaintiff as foreman of the welding crew, which consisted of a welder and a helper. Mobil gave plaintiff instructions as to the work to be done. Mobil also contracted with National Boat Corporation to supply the vessel, State-Race, and a crew consisting of a captain, an engineer and a deckhand.

Under Bell's supervision, Taylor's welding crew and all of their equipment and materials were loaded onto the State-Race in Cameron, Louisiana at the Mobil docks. A diving crew, not furnished by Taylor and not under Bell's supervision, also boarded the vessel with its equipment. The vessel proceeded to the platform. As foreman of Taylor's crew, plaintiff advised the captain where he wanted the vessel positioned to perform the welding. The diving crew also advised the captain as to the position in which it desired the vessel to be moored for its work. The method of mooring the vessel in those positions was under the sole control of the captain.

At the time of the accident, the vessel was moored with a hawser from the starboard stern bit, located 6 to 8 feet forward of the stern. The hawser ran aft 25 or 30 feet from the bit to the place where it was tied to the platform. The stern of the vessel was placed toward the direction from which the waves were coming.

Some of the welding equipment and supplies were unloaded from the vessel onto the platform, and the work had been in progress for two or three days when the accident occurred. Plaintiff was on the stern of the vessel directing the work of the welder on the platform. For about 45 minutes before the accident, plaintiff had been standing about one foot from the stern and one foot from the starboard rail. While standing in that position, a wave caused the stern of the vessel to drop, and the hawser came over the starboard rail and struck plaintiff on the leg, causing a fracture.

The evidence shows that the swells in the gulf had been running approximately three to four feet in heighth. No difficulty had been experienced with the hawser prior to the accident. The swell that came in immediately before the accident was larger than usual, and this is what caused the stern of the vessel to drop and allow the mooring line to come over the starboard rail.

Before discussing the issues, it is appropriate to state the scope of our appellate review. In civil cases involving state law, the appellate courts of Louisiana have constitutional authority to review both the law and the facts. However, a Louisiana appellate court's review of a jury verdict in a suit under the Jones Act, is the same as that of the Federal Courts. Under Federal law and jurisprudence, an appellate court cannot disturb the finding of fact of a trial jury on the merits unless there is no reasonable evidentiary basis for the jury's conclusion. See Trahan v. Gulf Crews, Inc., La., 255 So.2d 63 (1971) and the cases cited.

WAS PLAINTIFF A SEAMAN?

The first issue is whether the plaintiff was a seaman within the meaning of the Jones Act, 46 USCA 688. The recent case of Barrios v. Louisiana Construction Materials Company, 465 F.2d 1157 (5th Cir. 1972) states the three traditional requirements for qualification as a seaman: (1) There must be a vessel in navigation. (2) The individual must have a more or less permanent connection with the ship. (3) The capacity in which the individual is employed, or the duties which he performs, must contribute to the function of the vessel or to the accomplishment of its mission.

Under these tests, we have little difficulty in concluding that the plaintiff in the present case was a seaman. The State-Race was a vessel in navigation. The plaintiff was living and working on the vessel during the performance of his duties as foreman of the welding crew. The duties which plaintiff was performing contributed to the function or mission of the vessel, which was to assist in the repair of the platform. There was clearly sufficient evidence to support the jury finding that plaintiff was a seaman under the Jones Act.

WAS TAYLOR A JONES ACT EMPLOYER?

In Barrios v. Louisiana Construction Materials Company, supra, the court recognizes there is a substantial conflict in the cases from Federal appellate courts on the question of whether a Jones Act employer must have control of the operation of the vessel to which the injured seaman was attached. Some cases hold that a Jones Act employer must have operational control of the vessel.

Other cases allow Jones Act recovery against an employer who does not own or control the vessel but controls only the operation which resulted in the seaman's injury. In Barrios, the court allowed Jones Act recovery, even though the jury found that the employer did not have operational control over the vessel.

The facts in Barrios were that Williams-McWilliams contracted with The Greater Lafourche Port Commission to construct a flood protection levee. Williams-McWilliams leased a 90-ton dragline from Louisiana Construction Materials Company. The plaintiff, Barrios, had been an oiler on the dragline for Louisiana Construction, so Williams-McWilliams employed Barrios to continue those duties. The dragline was transported to the construction site on a barge owned and controlled by Louisiana Construction. The barge was not leased to Williams-McWilliams.

The barge remained at the work site and was used to furnish oil, fuel, equipment and other services for the dragline. While the dragline was operating on the shore, about 500 feet from the barge, it became bogged down in mud. The barge was sent back to secure a second dragline to pull the bogged dragline out of the mud. After the second dragline had been loaded on the barge, and the spuds at each end of the barge were being lifted, one of the spud cables became fouled. While physically pulling on the fouled cable, Barrios sustained an injury to his back.

The jury found that Barrios was a member of the crew of the barge and was a seaman, that he was injured on the barge while in the course of his employment by Williams-McWilliams, that Williams-McWilliams was negligent,

and that this negligence was a cause of Barrios's injuries. Based on these findings, judgment was entered against Williams-McWilliams under the Jones Act.

However, the jury also found that Louisiana Construction Materials Company was the operator of the barge and thus liable to Barrios under the general maritime law, because of the unseaworthiness of the barge. Williams-McWilliams argued that since the jury found it was not the operator of the barge, it could not be liable under the Jones Act. The court held that although Louisiana Construction had control over the barge, Williams-McWilliams had control over the operations which resulted in injury to Barrios, and this is sufficient to support Jones Act liability.

We are unable to distinguish Barrios from the present case. In its brief, Taylor states that in Barrios, Williams-McWilliams had leased the spud barge from Louisiana Construction, and therefore had control of the vessel, whereas in the present case Mobil Oil had leased the State-Race and Taylor had no control whatever over the vessel. As we read the Barrios decision, it clearly states (465 F.2d 1164) that Williams-McWilliams had leased only the dragline and had not leased the barge, which was being towed by Louisiana Construction's tug and was under the control of Louisiana Construction. The present case and Barrios are therefore the same in that plaintiff's employer was not in control of the vessel.

We conclude that under the Barrios decision the defendant Taylor in the present case was a Jones Act employer.

WAS TAYLOR NEGLIGENT?

The next issue is whether Taylor was guilty of negligence which was a cause of the accident. The district judge's charge to the jury correctly states the law on employer negligence under the Jones Act as follows:

> "We next turn to the question of whether the employer, Taylor's Welding Service, was negligent within the meaning of the Jones Act.
>
> "In order to recover, the plaintiff must prove that the employer was negligent. And the first question you must consider therefore is: What is negligence?
>
> "Negligence is the doing of some act that a reasonably prudent person would not do, or the failure to do something a reasonably prudent person would do, under the same or similar circumstances. It is, in other words, the failure to use ordinary care under the circumstances.
>
> "The mere *occurrence* of an accident, of course, does not raise any presumption of negligence.
>
> "The obligation of an employer under the Jones Act for the safety of seamen is substantially greater than that of an ordinary employer to his employee. The word 'negligence' therefore, as used in the Jones Act, which makes the employer of seamen liable for his negligence, must be given a liberal interpretation. It includes any breach of any obligation that the employer owes to

seamen, including the obligation of seeing to the safety of the crew.

Under the Jones Act, if the employer committed, through its officers, agents or employees, some negligent act or omission that played any part, no matter how small, in actually bringing about the injury to David Bell, then you should find that the employer was negligent.

"Negligence under the Jones Act may consist of a failure to comply with a duty required by law. Employers of seamen have a legal duty to provide their employees with a safe place in which to work. If you find that in this case the plaintiff was injured because the defendant failed to furnish him with a reasonably safe place to work and that the plaintiff's working conditions could have been made safe through the exercise of reasonable care, then you may find that the defendant was negligent.

"In addition to proving that the employer was negligent as I have previously explained, David Bell must prove that such negligence was a contributing cause of the accident. This brings up the law of 'causation'.

"Under the Jones Act, an injury is considered caused by an act, or failure to act, when it appears, from a preponderance of the evidence in the case, that the negligent act or omission, played any part, no matter how small, in bringing about or actually causing the injury."

The evidence shows that Larry Taylor negotiated the contract with Mobil Oil Corporation to repair the offshore platform. Under the agreement, Mobil Oil provided the vessel, State-Race, to transport the men and equipment to the platform and to serve as living quarters and a place of work for the Taylor crew. Plaintiff contends Taylor knew or should have known his employees would be performing work aboard the vessel, and knew or should have known it would be necessary for the plaintiff to stand on the stern of the vessel to supervise the work. It is plaintiff's position that Mr. Taylor knew or should have known that the vessel would be moored to the platform and he should have given special instructions to the captain to moor the vessel in such a manner as to prevent the mooring lines from coming over the rail, or he should have provided special equipment to protect his employees against this hazard.

Taylor's contention is that he delegated to plaintiff the duty to take all necessary precautions for the safety of Taylor's employees. The evidence shows that plaintiff was a competent and experienced oilfield worker. He had been engaged in oilfield work for approximately 40 years, the last 15 years of which he worked for Mobil Oil as a field foreman, and much of this last 15 years being devoted to offshore work. Plaintiff had retired from Mobil at the age of 62 and gone to work as a welding foreman for Taylor. During the negotiations, Mobil indicated it would like to have plaintiff supervise Taylor's work on the platform because Mobil knew plaintiff was well qualified.

Plaintiff's own testimony shows he understood he was in complete charge of the job, including the safety of the

crew, and he felt he was capable of handling any situation that arose. Plaintiff testified as follows:

"Q I see. Did you consider it necessary for Mr. Taylor to give you any instructions as to checking the safety of this boat, STATE RACE?

"A Mr. Taylor and I had worked on similar jobs a number of times. We were both acquainted with the job, and it was kind of — just like you don't need any instructions to do your job.

"Q Yes sir.

"A Well, that's the way I was.

"Q Thank you. Well, do I — I gather from what you have just said, you felt you were just as capable as Mr. Taylor to handle any situation that arose?

"A I think that's correct; unless it concerns some technical part of welding that I wasn't versed on.

"Q And to particularly handle any question as to safety?

"A That's right."

We find no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent. Taylor delegated to plaintiff, a competent and experienced foreman, the duty to take any precautions necessary for the safety of the welding crew. There is no evidence that plaintiff could not or did not perform his duties as to safety. There is no evidence that the vessel was improperly moored. There is no evidence as to any type of special equipment which could have been secured by Taylor or by plaintiff to prevent the hawser from coming over the rail. In the absence of any evidence as to special mooring or special equipment which could have been used to prevent the accident, how can it be concluded that Taylor was negligent in failing to furnish such safety precautions?

Having concluded there is no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent, it is unnecessary for us to consider whether plaintiff was contributorily negligent or any of the other issues in the case.

For the reasons assigned, the judgment appealed is reversed and set aside. It is now ordered, adjudged and decreed that there be judgment herein in favor of the defendant, Taylor's Welding Service, Inc., rejecting plaintiff's demands at his cost. All costs of this appeal are assessed against the plaintiff appellee.

REVERSED AND RENDERED.

APPENDIX "C"

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

* * * *

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances. machinery, track, roadbed, works, boats, wharves, or other equipment.

Apr. 22, 1908. c. 149, § 2, 35 Stat. 65.

* * * *

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover

damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

* * * *

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.